CRIMINAL APPEAL NO. 525 OF 1993.

Date of decision: 24.12.1996

For approval and signature

The Honourable Mr. Justice S. D. Dave

and

The Honourable Mr. Justice R. R. Jain

Mr. Ashok D. Shah, advocate for the appellant.
Mr. S. R. Divetia, A.P.P. for the respondent-State.

1. Whether Reporters of Local Papers may be allowed to see the judgment? No

2. To be referred to the Reporter or not? No

3. Whether their Lordships wish to see the fair copy of judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

Coram: S.D. Dave & R.R. Jain, JJ.
December 24, 196

Oral judgment (Per Dave, J.)

Placing reliance upon certain Supreme Court pronouncements learned counsel Mr. Ashok D. Shah for the appellant urges that the conviction of the appellant/accused for the commission of the offence punishable under Section 302 of IPC should be substituted by the conviction under Section 304 Part II of IPC. The said contention coming from the learned counsel for the

appellant/accused is being combated by the learned Government Counsel, Mr. S. R. Divetia, with the support of the Supreme Court pronouncement in the case of Jai Prakash (Appellant) v. State (Delhi Administration) (Respondent), (1991) 2 SCC 32.

The abovesaid rival contentions come before us in the background of the following facts:

The appellant/accused, Thakorbhai Patel, alongwith five other accused came to be charged for the alleged commission of the offences punishable under Sections 143, 147, 148 and 302 read with Section 149 of IPC. They were also charged for the offences punishable under Sections 504 and 506 (2) of IPC and under Section 135 of the Bombay Police Act, 1951.

One Kantibhai Patel, a resident of village Dora under Amod Taluka of Bharuch District, was working as the Sarpanch of the village. He and certain other persons, including the deceased Bhagwanbhai Patel, were supervising the excavation being done under the Jawahar Rojgar Yojna. At that time six accused persons had came there armed with weapons like 'dharia', 'gupti' and lathis. There was an objection coming from them that the excavation was being done in or near their wada land popularly known as "Gabhan". Some altercations had ensued and according to the case of the prosecution, the appellant/accused who happens to be the original accused No.5 had given a solitary blow on the head of the deceased Bhagwanbhai Patel with the dharia. The deceased with serious injury having fallen down, was removed to the hospital. He was made available the best possible treatment followed by expert investigations. Anyhow, after seven days he had died during the course of the treatment at Baroda. The offence earlier registered was one punishable under Section 326 of IPC which came to be altered to the offence punishable under Section 302 of IPC. The accused persons were put to the trial for the alleged commission of the abovesaid offences. The accused persons had denied the charge levelled against them. Anyhow, the learned Sessions Judge, Bharuch, acquitted the rest of the accused persons but the appellant/accused has been convicted for the offences punishable under Section 302 of IPC and under Section 37 (1) read with Section 135 of the Bombay Police Act, 1951. He has been acquitted of the rest of the offences. He has been sentenced to R.I. for life and to pay a fine of Rs.100/- and in default, to a further R.I. for one month for the main offence. He has been sentenced to the S.I. for one month and to pay a fine of Rs.15/- i.d., S.I.

for 15 days for the offences under the Bombay Police Act, 1951. The abovesaid judgment of conviction and sentence has been brought in challenge by the appellant/accused before us.

As indicated by us earlier, the solitary contention raised by the learned counsel Mr. Ashok Shah for the appellant/accused is that, regard being had to the settled legal position and to the factual scenario emerging from the prosecution evidence, the conviction requires to be altered to the offence punishable under Section 304 Part II of IPC.

Learned counsel Mr. Shah firstly has taken us to the ocular evidence coming from four eye witnesses i.e., P.W.2, Parshottambhai Patel (Ex.31), P.W.4, Sureshbhai Patel (Ex.49), P.W.7, Kantibhai Patel (Ex.52) and P.W.8, Arvindbhai Patel (Ex.59). The endeavour on the part of the learned counsel for the appellant was to establish that it is the case of the prosecution right from the beginning and developed before the trial court that a solitary dharia blow came to be given by the appellant/accused to the deceased. We have read the evidence of the abovesaid four witnesses, who definitely appear to be the eye witnesses to the incident. All of them unanimously say that the appellant/accused had tendered the solitary dharia blow which had fallen on the head of the deceased. Their evidence would also go to show that after giving the abovesaid dharia blow, no other injury came to be caused by the appellant/accused to the deceased. In the same way, this evidence would lead us to the conclusion that though other co-accused were also duly armed with different weapons they had not participated in the assault and none of them had caused any injury to the deceased. Thus, the ocular version would oblige us to record the finding that the appellant/accused had given the solitary blow by dharia which had injured the deceased on his head.

Turning to the medical evidence on record, in our opinion, the same conclusion can be deduced. P.W.9, Dr. Narendra Joshi (Ex.60), has testified that while he was working as the medical officer, Community Health Centre, Jambusar, the deceased was taken to him on June 2, 1991 at about 10.35 A.M., and had seen the injuries on the person of the injured Bhagwanbhai Patel who had later on expired. This evidence of Dr. Narendra Joshi would go to show that the blow which had proved fatal was possible by a sharp edged instrument like the muddamal dharia. This evidence would also go to show that there was one injury on the person of the decease which could have been

caused by the dharia. There is no other indication of any other accused playing any role. Of course, there were two other C.L.Ws on the head of the deceased but Dr. Joshi has opined that these injuries were possible by the fall also. We shall have to remind ourselves that no eye witness has said that any other injury except the dharia injury came to be caused by the appellant/accused.

The rest of the medical evidence shall have to be seen with a view to find out the course of the treatment and the cause of death. P.W.10, Dr. Deepak Joshi (Ex.62), who was working as a Neuro-surgeon at Baroda has deposed that he was called to see the patient at a local orthopedic hospital at Baroda and he had advised the CT Scan. It appears that the CT Scan was done by P.W.1, Dr. Neena Dave (Ex.29). After having obtained the CT Scan report, Dr. Deepak Joshi had performed the neurosurgery. It appears that the condition of the deceased was not improving but was found to be deteriorating. The medical evidence would go to show that the medical experts had noticed renal failure also, for which the deceased was put to dialysis for some time. The deceased was taken to Bhailal Amin Hospital, Baroda where he had succumbed. The evidence of P.W.11, Dr. Rakesh Tandon (Ex.65), requires to be referred with a view to ascertain the cause of death. Evidence of Dr. Tandon is at Ex.65 and he has produced the post-mortem report at Ex.66. It is apparent that the deceased had died because of Cranio Cerebral damage. Therefore, the medical evidence on record would go to show that despite the very good treatment, after all the necessary investigations the deceased had succumbed and the cause of death assigned by Dr. Tandon is cranio Cerebral damage following the head injury. Dr. Tandon had advised a detailed pathological study which was done by P.W.12, Dr. Sarala Pattra (Ex.75). The cause of the death remains the same.

After having perused the factual position, a reference shall now have to be made to the Supreme Court pronouncements on which learned counsel Mr. Ashok Shah for the appellant/accused places reliance.

The first in sequence is the Supreme Court pronouncement in Ganga Das alias Godha (Appellant) v. State of Haryana (Respondent), 1994 Cri.LJ 237. It was a case of the accused inflicting one pipe blow on the head of the deceased and the deceased dieing 18 days after the operation due to certain complications set in. The Supreme Court has come to the conclusion that the offence punishable under Section 302 of IPC was not made out. The Supreme Court pronouncement notices with pertinence

that the doctor had found only one injury on the head of the deceased and that was due to the single blow inflicted with an iron pipe and not with any sharp edged weapon. It was also noticed that the medical evidence had showed that the injured was operated but unfortunately some complications set in and ultimately he had died because of cardiac failure, etc. The conviction of the appellant therein was altered from murder to one under Section 304 Part II of IPC. He was sentenced to undergo R.I. for six years.

The second decision on which the learned counsel for the appellant/accused places reliance is the Supreme Court pronouncement in Harish Kumar (Appellant) v. State (Delhi Administration) (Respondent), AIR 1993 SC 973. In that case the prosecution had established that the accused alone had inflicted the injury which had caused the death of the deceased. The deceased died two days after inflicting of the injury. The facts were that the appellant and one Rajan Mani went to the shop of the deceased and had requested him to close the tea-shop and had asked him to take part in playing Holi. The deceased had refused to accede to this request. Thereafter the appellant and Rajan Mani went away with dire threat. One hour thereafter, the appellant came holding a gupti in his right hand to the shop by which time the decease was closing it. Rajan Mani took the deceased in his arms while the appellant had inflicted a fatal blow near the neck and also gave other minor injuries. The evidence of one Ved Prakash, P.W.1, father of the deceased, was found to be sufficient to hold that the appellant alone had inflicted the injuries which had resulted into the death of the deceased Sudhir. The time lag between the moment of inflicting the injury till the time of death which was of two days was also taken into consideration. Under these circumstances, the Supreme Court has taken a view that though the injury had resulted in the death of the deceased it cannot be said conclusively that it was sufficient to cause the death and, therefor, the offence would be one falling under Section 304 Part II of IPC.

The third decision being pressed in service by the learned counsel for the appellant/accused is the Supreme Court pronouncement in the Jagpati (Appellant) v. State of MP (Respondent), AIR 1993 SC 1360. It was a case in which the death was caused by injuries inflicted on head of the deceased in a sudden quarrel. The accused was having no intention to cause a particular injury which would be sufficient to cause the death. It was found by the Supreme Court that the accused might have knowledge that the injury is likely to cause death. The conviction

of the accused under Section 302 of IPC read with Section 34 of IPC was altered to one under Section 304 Part II read with Section 34 of IPC. The Supreme Court had noticed that there was a dispute regarding drawing of the water. After some people had intervened the appellant in company of certain other people had came back and he was armed with 'balli' (a stick with rings). It was the case of two injuries. But looking to the facts and circumstances of the case the view was taken by the Supreme Court that the conviction could be for the offence punishable under Section 304 Part II of IPC.

The last and the fourth decision on which learned counsel Mr. Ashok Shah places reliance is a rather recent decision of the Apex Court in Sarup Singh (Appellant) v. State of Haryana (Respondent), AIR 1995 SC 2452. It was a case of a single blow with hammer on the head. It was accepted that the accused had the knowledge, though no intention, that this injury was likely to cause death.

Therefore, the abovesaid Supreme Court decisions, as rightly urged by learned counsel Mr. Shah for the appellant, speak of the alteration of the conviction under Section 302 IPC to one under Section 304 Part II of IPC. Not only the factum of there being single injury or more than one injuries, but the facts and circumstances also in which an injury or injuries, as the case may be, could be inflicted, were also taken into consideration.

As against the abovesaid decisions, reliance is sought to be placed by learned Government Counsel, Mr. Divetia, on the Supreme Court pronouncement in Jay Prakash's case (supra). It was a case in which following the altercation and exchange of hot words a single kirpan blow was thrust on the chest of the deceased puncturing the heart causing his instantaneous death. After considering various decisions on the point the Apex Court had come to the conclusion that "intention" was established and the injury was found to be sufficient in ordinary course of nature to cause death. It is indeed true that this decision of the Supreme Court makes a reference to other decisions in which a similar question came to be dealt with by the Supreme Court. Nonetheless, it appears very clearly that ultimately the facts of the case on the hand of the Supreme Court came to be examined in view of the principles laid down by certain other decisions. The Supreme Court has noticed that the appellant therein was having an illicit relation with Agya Devi, the wife of the deceased, and his visits to her house were resented and objected. On the day of the occurrence, the accused had visited the house when the

deceased was not there and he had gone there duly armed with a kirpan. When the deceased had came to the house and had objected to his presence there was only an altercation and exchange of hot words but no fight. There upon the accused had taken out a kirpan and stabbed on the chest of the deceased resulting in instantaneous death of the deceased. The abovesaid circumstances, in the opinion of the Supreme Court, had shown that the accused intentionally inflicted that injury though it may not be a premeditated one. These circumstances were taken by the Supreme Court as definitely indicating the state of mind, i.e., that the appellant aimed and inflicted that injury with a deadly weapon with intention. Inviting distaste of repetition, we would prefer to say that the facts of the case on hand would justify the contention coming from learned counsel Mr. Shah for the appellant/accused. We have noticed that the Sarpanch of the village in the company of the deceased was busy getting the excavation made under Jawahar Rojgar Yogna and that the appellant/accused and his companions were under the belief that the excavation was going on in their own land or 'Gabhan' or just in the vicinity of the same. All the accused persons were duly armed with weapons but the solitary blow, which ultimately proved fatal, was given by the appellant/accused alone. Moreover, the deceased had died after seven days despite a very good treatment which had followed scientific investigations. These facts take out the present case from the purview of the say of the Supreme Court in the case of Jay Prakash (supra).

Thus, upon the reading of the principles laid down by the Supreme Court in the aforementioned cases, we are of the opinion that regard being had to facts of the case the appellant/accused is justified perfectly in urging before us through learned counsel Mr. Shah that his conviction under Section 302 of IPC requires to be substituted/altered for the conviction under Section 304 Part II of IPC. We order accordingly. The other part of the judgment regarding the conviction under Section 37 (1) and Section 135 of the Bombay Police Act, 1951 remains unaffected.

Then comes the question regarding the appropriate sentence to be awarded to the appellant/accused. He is behind the bars since June 13, 1991. In other words, he had already undergone the sentence of about five years and six months. In our view, the interest of justice would be maintained if he is sentenced to R.I. for six years. We order accordingly. The judgment of conviction and sentence under challenge shall stand modified

accordingly as the present appeal succeeds in part.